No. 88-239

In the Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a manufacturer of asbestos products found liable to a shipyard worker who contracted asbestos-related diseases may bring a third-party tort suit seeking contribution and indemnity from the United States, the shipyard worker's employer and the owner of the vessels on which he worked.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 846 F.2d 888. The opinion of the district court (Pet. App. 22a-46a) is reported at 657 F. Supp. 803.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1988 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on August 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, Charles Press, a sheetmetal worker at the Philadelphia Naval Shipyard for 35 years, died from asbestos-related diseases. His widow subsequently was awarded $575,000 from petitioner and six other manufac-

turers of asbestos insulation whose products had been used at the shipyard. Petitioner settled with Mrs. Press for $67,824.40, and then filed this action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, in the United States District Court for the Eastern District of Pennsylvania seeking contribution and indemnity from the United States, Mr. Press's employer. Pet. App. 23a. In light of that court's prior decision in *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119 (1984) (*reprinted in* Pet. App. 50a-90a), where it allowed a third-party action similar to that presented here to go forward under 33 U.S.C. 905(b) against the United States in its capacity as the owner of the vessels on which the injured employee worked, petitioner sought recovery only on that basis (Pet. App. 24a-27a).

Petitioner thus essentially adopted the theory of the *Colombo* case, and did not contest aspects of that decision's reasoning which barred liability other than under Section 905(b). The court in *Colombo* first noted that under the Pennsylvania Workmen's Compensation Act, workers' compensation benefits are the exclusive remedy which injured employees may obtain from their employers for injuries suffered in the course of their employment (Pet. App. 59a). Applying the FTCA provision making the United States liable "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674), and noting both the exclusive liability provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8116(c)[1] (Pet. App. 60a) and the

[1] Section 8116(c) provides that the government's payment under the FECA are "exclusive and instead of all other liability of the United States • • • to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States."

general rule of Pennsylvania law that a party is not liable on a third-party action unless it is liable on the underlying claim (*id.* at 70a), the court dismissed all of the third-party claims in *Colombo* except that raised under the vessel-owner liability provision of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. 905(b).

Section 905(b) provides that a person injured "by the negligence of a vessel" may obtain recovery.[2] Since "an employee of a private shipyard would be able, under the LHWCA, to maintain an action for negligence against the shipyard in its capacity as vessel owner" (Pet. App. 75a), and the private shipyard would therefore be subject to third-party suits by parties found liable in tort to the employee,[3] the district court held in *Colombo* that the manufacturers of asbestos products could proceed with their third-party action against the United States in its capacity as vessel owner.

2. In this case, the United States argued in the district court against the Section 905(b) "vessel owner" theory of liability which the court recognized in *Colombo*. It relied primarily on the decisions of the First Circuit in *Drake* v. *Raymark Indus., Inc.*, 772 F.2d 1007 (1985), cert. denied,

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[2] This Court held in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), that an employer covered by the LHWCA may be sued by its employees, as a vessel owner under Section 905(b), even if it is not subject to suit under Section 905(a), in its capacity as an employer, due to the existence of an exclusive workers' compensation remedy.

[3] Congress amended Section 905(b) in 1984 to provide that employees may not sue their employers under that provision in their capacity as owner of the vessel on which they worked. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1641. However, that amendment does not apply to cases such as this where the injury occurred prior to the date of the amendment. Pet. App. 74a-75a n.7.

476 U.S. 1126 (1986), and *In re All Maine Asbestos Litigation* (*PNS Cases*), 772 F.2d 1023 (1985), cert. denied, 476 U.S. 1126 (1986), where the court held that Section 905(b) provides a cause of action to persons injured on vessels only if their claims would be cognizable in admiralty. To establish admiralty jurisdiction under the test set forth in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 268 (1972), a plaintiff must show both that he was injured "on or over navigable waters" (a situs test), and "that the wrong [bore] a significant relationship to traditional maritime activity" (a nexus test). Like the other seven courts of appeals that have considered the matter (Pet. App. 16a), the First Circuit held that asbestos-related claims by land-based shipyard workers do not have a significant relationship to traditional maritime activity (772 F.2d at 1014-1016).[4] Since shipyard workers thus could not bring their own claims under Section 905(b) for injuries caused by exposure to asbestos, the First Circuit reasoned that there was no basis for third-party claims by manufacturers of asbestos products against public or private shipyards.[5]

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[4] In addition to the First Circuit, the Second (*Keene Corp.* v. *United States*, 700 F.2d 836, 843-845, cert. denied, 464 U.S. 864 (1983)), Third (Pet. App. 15a-18a)), Fourth (*Oman* v. *Johns-Manville Corp.*, 764 F.2d 224, 230-232 (en banc), cert. denied, 474 U.S. 970 (1985)), Fifth (*Lowe* v. *Ingalls Shipbuilding*, 723 F.2d 1173, 1187-1190 (1984)), Ninth (*Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119 (1984), Eleventh (*Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 786 (1984)), and Federal (*Lopez* v. *A.C.&S., Inc.*, No. 87-1543 (Sept. 28, 1988), slip op. 20) Circuits have so held.

[5] It is settled that third-party tort suits against LHWCA employers are barred when those employers may not be sued directly by the underlying plaintiffs, their employees, as 33 U.S.C. 905(a), the LHWCA's exclusivity provision, states. See, *e.g.*, *Drake* v. *Raymark Indus.*, 772 F.2d at 1019-1022; *Ketchum* v. *Gulf Oil Corp.*, 798

The district court below rejected the reasoning of *Drake* and *All Maine Asbestos Litigation*, and instead relied primarily on the Fifth Circuit's decision in *Hall* v. *Hvide Hull No. 3*, 746 F.2d 294, 303, cert. denied, 474 U.S. 820 (1985), where the court held that employees could bring actions under Section 905(b) whether or not their claims had a significant relationship to a traditional maritime activity.[6] It thus concluded that shipyard workers need not establish that their work had a traditional maritime nexus in order to pursue an action under Section 905(b) (Pet. App. 36a-44a), and denied the government's motion to dismiss petitioner's third-party claims (*id.* at 45a). The court certified its order for interlocutory review (*id.* at 19a-21a).

3. The court of appeals reversed (Pet. App. 1a-18a), basing its decision primarily on 33 U.S.C. (Supp. IV) 903(b), which excludes federal employees from the LHWCA's coverage.[7] Since Mr. Press, as a federal employee, was barred by Section 903(b) from bringing suit under Section 905(b), and, under the LHWCA and Pennsylvania law, third-party actions may not be maintained against parties who are not directly liable (Pet. App. 7a), the court held that "[t]his express congressional exclusion of federal workers from LHWCA coverage precludes

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F.2d 159, 161-163 (5th Cir. 1986); *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714, 719 (2d Cir. 1978); *White* v. *Johns-Manville Corp.*, 662 F.2d 243, 247 (4th Cir. 1981); *Graco, Inc.* v. *Colberg, Inc.*, 162 Cal. App. 3d 322, 330-335, 208 Cal. Rptr. 461, 470-473 (1984), cert. denied, 474 U.S. 820 (1985).

[6] The en banc Fifth Circuit recently overruled *Hall* in *Richendollar* v. *Diamond M. Drilling Co.*, 819 F.2d 124, 125-126 (1987), cert. denied, No. 87-504 (Nov. 9, 1987).

[7] Section 903(b) provides that "[n]o compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof."

[petitioner] from using the FTCA to accomplish indirectly what federal employees could not accomplish directly" (*id.* at 13a).

The court also stated that its decision "could have been based" on FECA's exclusivity provision, 5 U.S.C. 8116(c) (Pet. App. 11a n.8). Although under *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), Section 8116(c) does not directly bar third-party suits against the government based on an injury to a government employee, the court below concluded that "the immunity it creates against suits by federal employees is a significant circumstance that we would have to consider under the FTCA" (Pet. App. 11a n.8). In other words, because the government may not be sued in tort by its employees on account of Section 8116(c) of the FECA, the United States is properly analogized under the FTCA to a private party that is immune from tort suits by its employees. Where, as under Pennsylvania law, a party is immune from third-party suits if it is not directly liable, the United States should not be subject to such actions pursuant to the FTCA.

ARGUMENT

1. There is no conflict in the courts of appeals on the question presented by this case—whether manufacturers of asbestos products may bring third-party suits against the government in its capacity as the owner of the vessels on which its shipyard employees were injured by exposure to asbestos. Thus far, three courts of appeals have considered the issue, and all three have correctly concluded that the government is immune from such suits.

Like the First Circuit in the *All Maine Asbestos Litigation*, the Federal Circuit recently concluded that "[n]egligence claims under section 905(b)[] are those covered by

federal maritime principles." *Lopez* v. *A.C.&S., Inc.*, No. 87-1543 (Sept. 28, 1988), slip op. 23. Those courts are correct. The common law of admiralty recognized various actions available to shipyard workers, including an absolute liability action for "unseaworthiness" by a longshoreman injured on a vessel lying in navigable waters. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). Congress enacted Section 905(b) in 1972 to replace that unseaworthiness action with a negligence action comparable to that available to longshore and harbor workers at common law. As the First and the Federal Circuits have concluded, Congress did not intend that negligence action to extend beyond the scope of admiralty jurisdiction. Rather, like the unseaworthiness claim and the common law negligence claim, a plaintiff may bring suit under Section 905(b) only if the suit satisfies the jurisdictional requirements of admiralty law.[8] And, as the court below noted, all of the courts of appeals to consider the matter have concluded "that asbestos-related claims by land-based ship workers bear no significant relationship to traditional maritime activity" (Pet App. 16a), so there is no basis for such claims under Section 905(b).

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[8] *Holland* v. *Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (§ 905(b) did not "enlarge the traditional jurisdiction of admiralty over maritime torts"); *Christoff* v. *Bergeron Indus., Inc.*, 748 F.2d 297, 298 (5th Cir. 1984) (§ 905(b) "neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty"); and *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 787 n.9 (11th Cir. 1984) (§ 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties"). While the Fifth Circuit appeared to reach a contrary conclusion in *Hall* v. *Hvide Hull No. 3*, that decision was explicitly overruled in *Richendollar*.

The reasoning relied on by the court below—looking primarily to Section 903(b) of the LHWCA and secondarily to Section 8116(c) of the FECA—is also correct. Congress has made it doubly clear that federal shipyard workers may not bring suit against the United States under Section 905(b). Federal employees are exempted from coverage under the LHWCA by Section 903(b), and they are also expressly prohibited from suing the United States by Section 8116(c) of the FECA. In determining whether the United States is liable under the FTCA, one must look to the liability of "a private individual under like circumstances." Those "like circumstances" include those provisions which make clear that the United States has no direct liability to the injured employee. Thus, the United States should be analogized to a private shipyard owner whose employees have no cause of action against it. There would be no basis for a direct claim by an employee against an employer protected from direct suit by operation of law, and hence no basis for a third-party claim, under applicable Pennsylvania law.[9]

2. Apparently recognizing that there is no conflict in the courts of appeals on the question presented,[10] peti-

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[9] The decision of the court below is supported by *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952), and *Patterson* v. *United States*, 359 U.S. 495, 496 (1959), where this Court held that federal seamen who have a remedy under the FECA may not sue the United States under the Public Vessels Act or the Suits in Admiralty Act, even though FECA's exclusivity provision does not apply to "a member of a crew of a vessel" (5 U.S.C. 8116(c)). Those decisions show that Congress did not intend " 'to have two systems of redress' " for federal employees (*Patterson*, 359 U.S. at 496 (quoting *Johansen*, 343 U.S. at 439)). Accordingly, federal employees who are eligible for compensation under the FECA should not be analogized to employees who may sue the United States.

[10] Petitioner cites (Pet. 11-12) three *district* court decisions (one of which was reversed) that disagreed with the result reached by the

tioner primarily argues (Pet. 14-23) that review by this Court is warranted on account of a conflict on another question. That disagreement involves the availability and theory of federal employees' suits against *private* vessels on which they are injured. While there is a difference of view between the Fifth and Ninth Circuits on that question, the issue is not presented here. Mr. Press was injured by exposure to asbestos on vessels owned by the United States, and nothing in the decision of the court below implicitly resolves that issue.

In *Aparicio* v. *Swan Lake*, 643 F.2d 1109 (1981), the Fifth Circuit concluded that federal employees may bring common law unseaworthiness actions of the sort described in *Sieracki* against private vessels. The court reached that conclusion despite the 1972 enactment of Section 905(b), which, in the case of private longshore and harbor workers, replaced the unseaworthiness action with a statutory negligence action. The court concluded that Section 905(b) was not intended to have effect beyond the coverage of the LHWCA (643 F.2d at 1116), so that workers not covered by the LHWCA—such as federal employees, who are exempted from its coverage by Section 903(b)—were not affected by the amendment. The Ninth Circuit, in contrast, held in *Normile* v. *Maritime Co.*, 643 F.2d 1380, 1383 (1981), that Congress intended the 1972 amendment to eliminate the unseaworthiness remedy not just for workers covered by the LHWCA, "but for other longshoremen whose rights were judicially created." However, that court stated that federal employees could bring negligence actions against private vessels.[11]

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court below. That sort of disagreement does not, of course, warrant review by this Court.

[11] The Ninth Circuit stated in a footnote in *Normile* that its conclusion did not leave the plaintiff without a remedy, citing the FECA

The decision below does not indicate whether the Third Circuit would conclude that federal employees who can establish admiralty jurisdiction may bring unseaworthiness actions against private vessels. Nor, contrary to petitioner (Pet. 21), did the decision below conclude that federal longshore and harbor workers have no claims at all against private vessels.[12] There is no warrant to review this case to resolve either issue.

3. Petitioner also argues (Pet. 23-28) that the court below erred in taking Section 903(b) of the LHWCA and Section 8116(c) of the FECA into account in making the FTCA-mandated determination whether "a private individual under like circumstances" (28 U.S.C. 2674) would be liable. In petitioner's view, those bars to government liability should be ignored, and the question should simply be asked whether a private shipyard owner without such statutory protections would be liable.[13] But the FTCA

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and adding that the plaintiff could "recover from defendant under the Longshoremen's Act upon a showing of negligence" (643 F.2d at 1382 n.2). That latter reference to the LHWCA remedy appears to be erroneous, in light of Section 903(b). However, it may be that federal longshore and harbor workers may pursue the common law negligence action that was relied upon prior to *Sieracki*.

[12] It may be that the court below would conclude that federal longshore and harbor workers may pursue either a common law negligence action or an unseaworthiness action against private vessels, since Section 903(b) does not specifically bar such claims. Even though a federal employee may pursue such an action against a private shipyard owner, it does not follow that he could pursue such an action against the United States, in light of the exclusivity provision in the FECA (see Pet. App. 11a n.8).

[13] The theory upon which petitioner rests its case—that under *Jones & Laughlin* private shipyard owners are subject to suit by their employees under Section 905(b) in their capacity as vessel owner—will not recur in the future because Congress has amended Section 905(b) to bar such "dual capacity" suits. See note 3, *supra*. Although the

refers to the liability of private parties "under like circumstances," and immunity to direct suit by the underlying plaintiff is a circumstance which should not be ignored.

Contrary to petitioner's assertion (Pet. 26-27), that conclusion does not conflict with the law of the Ninth Circuit. The decisions of that court demonstrate that the absence of direct tort liability is a relevant circumstance in determining potential third-party liability under the FTCA. The Ninth Circuit recognized in *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379, 403-404, cert. dismissed, 379 U.S. 951 (1964), that an airline could not recover tort indemnification from the United States for payments made by the airline to plaintiffs who were government employees. It reached that result notwithstanding the conclusion that the FECA did not *itself* bar such recovery, because applicable state law barred recovery against those not liable in tort to the underlying plaintiffs. Accord *Wien Alaska Airlines, Inc.* v. *United States,* 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967); *Adams* v. *General Dynamics Corp.,* 535 F.2d 489 (9th Cir. 1976), cert. denied, 432 U.S. 905 (1977).

The cases cited by petitioner, *LaBarge* v. *Mariposa County,* 798 F.2d 364, 367 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), and *Bell Helicopters* v. *United States,* 833 F.2d 1375, 1378 (9th Cir. 1987), are not to the contrary. As petitioner notes (Pet. 26 n.14), the result in both cases, like the result here, was to *bar* the third-party claim against the government. Those cases differ from this only in that the government's immunity from direct suit

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amendment does not govern this case or the other asbestos cases pending at the time the amendment was enacted, the fact that the argument that petitioner makes has no prospective applicability further diminishes the need for review.

was mirrored almost perfectly in the immunity of a private employer under the worker's compensation bar. For that reason, they did not raise the issue presented here of whether the FTCA mandates consideration of a distinct legal bar to liability of the United States—here Section 903(b)—which is not mirrored in any parallel provision applicable to a private party.[14]

Significantly, in both cases the Ninth Circuit recognized that the basic thrust of the governing substantive law must control. The FTCA does not instruct a court to disregard immunities uniquely applicable to the United States on the ground that no such immunity could apply to a private party. In *LaBarge,* the court stated: "[T]he statutory language [of the FTCA] refers not to private persons under 'the same circumstances,' but to those under *similar* circumstances. * * * Because the federal government could never be exactly like a private actor, a court's job in applying the standard [for liability under the FTCA] is to find the most reasonable analogy." 798 F.2d at 367 (emphasis in original). Virtually identical language is found in *Bell,* 833 F.2d at 1378.[15]

Petitioner's argument (Pet. 27) that the court of appeals' approach is inconsistent with this Court's decision in *Lockheed* is without merit. *Lockheed* simply held that the FECA *itself* did not bar third-party tort actions arising out

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[14] Of course, even if no such consideration is appropriate under the FTCA, the First Circuit's alternative approach to the question presented, limiting Section 905(b) actions to cases in admiralty, see pages 3-4, *supra*, would lead to dismissal of petitioner's third-party claims here.

[15] Similarly, the Fourth Circuit, in *General Electric Co.* v. *United States*, 813 F.2d 1273, 1275 n.1, 1276 n.2 (1987), vacated and remanded on other grounds, No. 86-2015 (Jan. 19, 1988), noted that the FTCA "uses the term 'like circumstances,' rather than 'the same' or 'identical,' circumstances."

of injuries to federal employees. The Court explained that "the governing substantive law" would determine whether the government's immunity from direct suit would result in dismissal of FTCA third-party tort actions based on underlying suits by FECA-covered plaintiffs (460 U.S. at 199). Thus, where the governing substantive law permits third-party tort suits against those parties who are immune to direct suits by the underlying plaintiffs, third-party FTCA suits may proceed. See *e.g., Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963) (in a case arising out of a maritime collision under the old divided damages rule, contribution against the United States would be permitted because immunity to direct suit was irrelevant to such cases); *Doyle* v. *Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382 (1984) (under Illinois law, immunity of employer from direct suit does not immunize it from third-party tort suits). But the LHWCA and Pennsylvania law, the governing substantive law here, preclude third-party suits against parties immune from direct suits. See note 5, *supra* (LHWCA), and Pet. App. 63a (Pennsylvania law). In cases, like this one, in which the law applicable to private parties includes the rule that immunity of an employer to direct suit immunizes the employer from third-party tort suits, third-party FTCA claims based on injuries to federal employees—who are denied a direct cause of action against the United States—must be dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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